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IN THE
Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STUDENT AID FUNDS, INC.,
Petitioner,

v.

APRIL BRANNAN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circui

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REPLY BRIEF OF THE PETITIONER

EDWARD R. SCHMIDT
CHARLES T. GLEASON
DAVID B. BOODT
UNITED STUDENT AID FUNDS, INC.
11100 USA Parkway
Fishers, Indiana 46038-9213

CLIFFORD M. SLOAN
Counsel of Record
FRED F. FIELDING
SAMUEL D. WALKER
CAITLIN J. HALLIGA
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 2000
(202) 429-7000

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REPLY BRIEF OF THE PETITIONER

I.
INTRODUCTION

At issue in this case is a collision between the Higher Education Act (HEA) and the Fair Debt Collection Practices Act (FDCPA). The federal agencies charged with administering these Acts -- the U.S. Department of Education (ED) and the Federal Trade Commission -- are singular in their view that the FDCPA does not apply to non-profit student loan guaranty agencies such as the petitioner. ED furthermore has expressed its view that the Ninth

Circuit's decision in this case will undermine key federal objectives in redressing student loan defaults. The national association of student loan guaranty agencies has expressed its view as *amicus* that the Ninth Circuit's decision will sow chaotic uncertainty in our Nation's system of guaranteed student lending.

In the face of concern from all responsible quarters that the Ninth Circuit's decision threatens ED's reticulated scheme of student loan enforcement, respondent blithely asserts: "That regulations adopted by the DOE pursuant to the HEA are allegedly in conflict with the FDCPA is of no moment. It is axiomatic that a regulation which is contrary to law cannot be enforced." (Opp. 4).

Creation of inconsistent legal obligations from two statutory and regulatory schemes, however, is of very great moment. Whatever the resolution of this issue -- and we urge that, as ED and amicus have agreed, the Ninth Circuit's decision is fundamentally flawed -- the issue plainly merits review. Indeed, respondent's opposition highlights the necessity for review before the keen national interest in addressing student loan defaults is further imperiled.

II.
REPLY ARGUMENT

A. The Opposition Highlights An Issue of Fundamental and Recurring Significance.

To the extent that respondent acknowledges the inconsistent legal obligations imposed by the HEA and the FDCPA under the Ninth Circuit's reading of those Acts, her subsequent arguments illustrate the need for review. Besides

her "axiomatic" call for the *ab initio* invalidity of unspecified ED regulations, respondent urges in lieu of *certiorari* review that ED should modify its regulations (opp. at 6 & n.2); or that Congress should resolve the statutory collision through amendments (apparently to one or both statutes) (*id.*).

Petitioner agrees with respondent that the statutory collision is a problem of national scope. We agree that, if unaddressed, the collision directly implicates the legislative and executive branches of the federal government. And while respondent's calls for action by Congress and ED are misdirected, they richly illustrate the need for review. The conflicting obligations of the HEA and the FDCPA are not the result of statutory or regulatory anomalies; rather, they are the artifact of a Ninth Circuit decision that conflicts with all earlier agency interpretations and most earlier judicial decisions. The Court should consider the Ninth Circuit's decision before it necessitates legislative and administrative action.

To the extent that respondent alternatively asserts that there is no statutory collision, her argument again merely highlights the need for review. In an attempt to deflect attention from the obvious significance of the conflict created by the Ninth Circuit, respondent offers newly-minted theories that nowhere have been adopted by any court or administrative agency and that, in many instances, directly conflict with the pertinent agency's interpretation.

For example, respondent asserts that:

- "Due diligence" is a term of "no substance" that is "intangible," like "urging a child to 'play hard'." (Opp. at 6 & n. 2.) Neither the HEA[1] nor ED's implementing regulations[2] countenance this dismissive interpretation.

- Administrative wage garnishments by a guaranty agency pose only "technical" conflicts between the HEA and the FDCPA. (Opp. at 6) Yet Congress expressly authorized guaranty agencies to undertake administrative wage garnishment, 20 U.S.C. § 1095a(a) (1994), and there is no exception under the FDCPA for respondent's self-styled "technical" violations.[3]

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[1] 20 U.S.C. § 1078(c)(2)(A) specifically requires a program agreement which "shall set forth such administrative and fiscal procedures as may be necessary to protect the United States from the risk of unreasonable loss thereunder, * * * and to assure that due diligence will be exercised in the collection of loans insured under the program, including a requirement that each beneficiary of insurance on the loan submit proof that reasonable attempts were made to locate the borrower (when the location of the borrower is unknown) and proof that contact was made with the borrower (when the location is known)." (Emphasis supplied).

[2] ED's regulations describe "diligence" in concrete terms: *inter alia*, two telephone calls to the borrower "to demand repayment of the loan" (34 C.F.R. § 682.410(b)(6)(iv)(A), *quoted at* App. 72a), and "at least three written notices to the borrower forcefully demanding that the borrower immediately commence repayment of the loan * * *." (34 C.F.R. § 682.410(b)(6)(iv)(B), *quoted at* App. 72a.)

[3] Respondent confidently promotes two "easy" remedies to this "technical" conflict: the cessation of garnishment activities by guaranty agencies, or a statutory amendment -- neither of which is "easy" and both of which represent a significant change in existing law. (Opp. at 6 & n.2).

- Both USA Funds and the district court (at App. 27a) "misrepresented" the regulatory requirement of direct contact with a debtor, when in actuality there is no such requirement. (Opp. at 6). Yet ED has stated that the FDCPA's prohibition on direct cont act would impose conflicting legal obligations on non-profit student loan guaranty agencies like USA Funds.[4]

While these and other arguments about the supposed laxity or flexibility of ED's "due diligence" regulations are without merit,[5] they presage recurrent and increased confusion about the legal obligations of non-profit student loan guaranty agencies. Left unreviewed, *Brannan* at the very least would require courts to parse ED's due diligence regulations *vis a vis* the FDCPA, with highly uncertain and variable results for guaranty agencies forced to make day-to-day administrative decisions based on how future courts in

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[4] The U.S. Department of Education has explained that "[t]he FDCPA for example, would bar guarantors from direct contact with debtors represented by counsel, and would prohibit continued attempts to persuade borrowers to resume repayment after demands that contact cease. * * * These restrictions, accompanied by the risk of substantial penalties for even technical violations, could only tend to deter guarantor compliance with the collection process already established by the Department." (App. 92a.)

[5] For example, respondent places weight on the distinction between threats of actions that a guaranty agency will take (which she finds more offensive under the FDCPA), and multiple actions that a guaranty agency may take (which she finds less offensive). That position is directly at odds with paragraph 8 of her complaint, in which she seeks to recover under 15 U.S.C. § 1692e(5) for statements by USA Funds that tax offset "may" occur or that a lawsuit "may" occur.

unknown jurisdictions will construe ED's regulations in view of the FDCPA's conflicting mandate.

Touting the "fact intensiveness" of the issues underlying an FDCPA claim (opp. 8), respondent also argues that USA Funds has invoked ED's views in a supposedly different situation of "guaranty agencies collecting student loans in their 'own names.'" (Opp. at 7). While respondent's arguments again are substantively without support,[6] they point to a more basic reality of this and future litigations. This suit is about far more than a debtor promoting a "fact intensive" claim for monetary relief under the FDCPA. It is about a litigation weapon in the hands of student loan defaulters, a weapon that will worsen the serious national problem of defaulted student loans. This is so because defaulted student loans under the FFEL program tend to be small. Respondent's loan, for example, was for $2,371.72, on which summary judgment was entered for USA Funds and no appeal was pursued. (App. 34a). Defaulted student loans like respondent's comprise a serious national problem (in the many billions of dollars) not because they are individually large, but because there are so many of them.

Armed with FDCPA counterclaims after *Brannan*, student loan defaulters with no defense to their debt will be empowered to threaten a "fact intensive" counterclaim that,

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[6] ED has urged under the very circumstances of this case that "[t]he ruling that USA Funds is subject to the FDCPA appears to rest on a misreading of a Departmental statement but more importantly directly conflicts with the long-standing views of the Federal Trade Commission and the Department that, for reasons not addressed in the decision [at the panel stage], the FDCPA does not apply to guarantors." (App. 88a).

in terms of defense counsel fees alone, will quickly make prosecution of the underlying debt economically unviable. *Brannan*, in short, will result in more unredressed defaults: whether through a guaranty agency's non-compliance with ED's "due diligence" regulations, or through allegations of FDCPA violations after a guaranty agency has complied with "due diligence" -- allegations that all too often will force abandonment of the debt once they are posed in an FDCPA counterclaim.[7]

B. There Are Ample Bases for *Certiorari* Review

Respondent contends that "there is no conflict with the 9th Circuit Opinion and a decision by the highest court of any state," and that review is therefore "unwarranted." (Br. at 8). For two reasons, her argument does not raise an impediment to review.

First, even if there were no conflict at all, the Ninth Circuit's decision -- conflicting as it does with the settled administrative interpretations of two important federal statutes and threatening to disrupt daily implementation of a multi-billion dollar program -- would merit this Court's review.[8]

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[7] Taking respondent as an example, her FDCPA *ad damnum* exceeds the amount of her debt.

[8] In a footnote, Ms. Brannan recites the Ninth Circuit's characterization of a statement made by USA Funds before the Ninth Circuit panel (Opp. at 9, n.7). Ms. Brannan does not dispute that USA Funds merely was defending the district court's judgment on its own terms, as our petition explains. (Pet. at 12-13, nn. 11-12). Moreover, petitioner placed the whole statute at issue by arguing before the Ninth Circuit panel that Congress "did not intend for the FDCPA to apply to [non-profit]

Second, in contrast to respondent's submission, the Iowa Supreme Court in *Fischer v. UNIPAC Service Corporation*, 519 N.W.2d 793, 799 (1994) held that "collection efforts by holders of federally insured student loans * * * are simply not the kind of activity Congress intended to regulate [in the FDCPA]." *Id.* (emphasis added) Without a doubt, *Fischer* is in direct conflict with the Ninth Circuit's holding. *See also, e.g., Games v. Cavazos*, 737 F. Supp. 1368, 1389 (D. Del. 1990) ("I am convinced that Congress did not intend the FDCPA to apply to guarantee agencies administering the GSL Program in cooperation with ED.").

C. The Ninth Circuit's Decision Poses Concrete and Substantial Risks to the Federal Fisc.

Respondent contends that the asserted costs to the public fisc of the statutory collision are unreliable, insupportable, and "speculative." (Opp. at 5).[9]

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guaranty agencies" (Pet. App. 4A) and the Ninth Circuit explicitly reached that question. *Id.* Accordingly, as in the Court of Appeals, the fundamental question -- whether non-profit student loan guaranty agencies comprehensively regulated under the HEA also are subject to the FDCPA -- is squarely before the Court.

[9] Part of Respondent's argument is that USA Funds ascribes a cost to the public fisc of having to forego "abusive or harassing collection activities which violate the FDCPA." (Opp. at 5). That of course is not our argument, and our petition explained that any allegations of untoward behavior on the part of a guaranty agency can be addressed by the U.S. Department of Education in its administration of the guaranteed student loan program. (Pet. at 7).

Our petition explains the legislative history decrying high default rates and their impact on the federal fisc. (Pet. at 4-5.) Simply put, respondent's loan default is part of a serious national problem. For example, loan defaults increased over 300% in the 1980s, and as of the early 1990s, "more than half of the government's [FFELP] cost[s] [went] to pay for defaulted loans from the past rather than to subsidize education and training for today's students."[10]

The adverse impact on our Nation's taxpayers could not be clearer, as non-profit student loan guaranty agencies face a Hobson's choice between non-compliance with ED's regulations and alleged non-compliance with the FDCPA.[11] Either way, and absent review by this Court, the Ninth Circuit's far-reaching decision unnecessarily places billions of federal dollars at risk.

III.
CONCLUSION

For all of these reasons, and the reasons set forth in the Petition, we respectfully pray for the grant of a writ of *certiorari*.

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[10] S. Rep. 102-58, 102d Cong, 1st Sess. at 1 (1991).

[11] *See also, e.g.*, 137 Cong. Rec. v. H10209 (daily ed. Nov. 11, 1991) at H10209 (remarks of Congressman Solomon in support of administration wage garnishment) ("[N]othing aggravates the American taxpayer more than this issue. After living up to their own obligations and paying off their own loans at great personal sacrifice and suffering in many cases, they have then to shell out more taxes to foot the bill for those who refuse to pay back their own debts. * * * The reform proposal will greatly lessen the possibility of such defaults by requiring * * * more information to enable us to track and locate the borrower once he leaves school * * *.")

Respectfully submitted,

EDWARD R. SCHMIDT
CHARLES T. GLEASON
DAVID B. BOODT
UNITED STUDENT AID FUNDS, INC.
11100 USA Parkway
Fishers, Indiana 46038-9213

CLIFFORD M. SLOAN
Counsel of Record
FRED F. FIELDING
SAMUEL D. WALKER
CAITLIN J. HALLIGAN
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

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